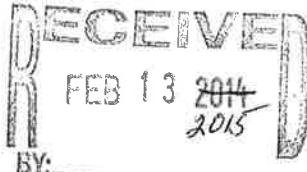


THE STATE OF NEW HAMPSHIRE

STAFFORD, SS.



TRUST DOCKET  
7<sup>th</sup> CIRCUIT COURT  
PROBATE DIVISION

J. MARK HALLETT, AMY HEBERT, HANNAH HEBERT, RACHAEL HEBERT,  
PATRICIA SANDERSON, JOHN A. HALLETT AND AMANDA HALLETT

V.

WILLIAM E. BRENNAN AND BARBARA D. HALLETT, INDIVIDUALLY AND AS CO-  
TRUSTEES OF THE RICHARD S. HALLETT 1996 REVOCABLE TRUST AND ITS SUB-  
TRUSTS KNOWN AS THE HALLETT FAMILY TRUST AND HALLETT MARITAL  
QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) TRUST

WILLIAM E. BRENNAN AND BARBARA D. HALLETT, INDIVIDUALLY AND AS CO-  
TRUSTEES OF THE RICHARD S. HALLETT 1996 REVOCABLE TRUST AND ITS SUB-  
TRUSTS KNOWN AS THE HALLETT FAMILY TRUST AND HALLETT MARITAL  
QUALIFIED TERMINABLE INTEREST PROPERTY (QTIP) TRUST

V.

J. MARK HALLETT, AMY HEBERT, HANNAH HEBERT AND RACHAEL HEBERT  
(HALLETT QTIP TRUST)

AND

HANNAH HEBERT, RACHAEL HEBERT, JOHN A. HALLETT, AND AMANDA  
HALLETT AND PATRICIA SANDERSON (HALLETT FAMILY TRUST)

Docket No. 317-2013-EQ-865

**OBJECTION OF CO-TRUSTEES WILLIAM E. BRENNAN AND  
BARBARA D. HALLETT TO HALLETT BENEFICIARIES' MOTION TO CONSIDER  
THE PROPOSED AMENDED PETITION INVOCATION OF SAFE HARBOR AND  
NH RSA 564-B:10-1014(c)(3) AND  
CO-TRUSTEES' CROSS-MOTION FOR RULING THAT HALLETT BENEFICIARIES'  
ACTIONS TO DATE CONSTITUTE A "CONTEST" AND PROHIBITING  
BENEFICIARIES FROM SEEKING FURTHER AMENDMENTS OR PRELIMINARY  
RULINGS REGARDING THE TRUST'S NO-CONTEST PROVISION**

William E. Brennan and Barbara D. Raskin Hebert Hallett, individually and as Trustees  
of the Richard S. Hallett 1996 Revocable Trust and all subtrusts contained therein (hereinafter,

collectively “the Co-Trustees”), by and through their counsel, hereby oppose the Hallett Beneficiaries’ Motion to Consider the Proposed Amended Petition Invocation of Safe Harbor and NH RSA 564-B:10-1014, and cross move for a ruling (1) that the Hallett Beneficiaries’ Actions to date constitute a “contest” and (2) prohibiting the Hallett Beneficiaries from seeking further amendments or preliminary rulings regarding the Trust’s No-Contest Clause. In support of their opposition, the Co-Trustees state as follows:

1. The Hallett Beneficiaries seek to file a Verified Amended Petition, but in their motion also seek a ruling that:

- A. if they prove one breach of trust, then the no-contest provisions of the Trust will not be enforceable against them;
- B. a preliminary ruling that the No-Contest clause is not triggered “because the action is brought for the construction or interpretation of the terms of the trust”;
- C. a ruling that the proposed Verified Amended Petition does not trigger the No-Contest clause;
- D. alternatively, a ruling from the Court as to what portion of the proposed Verified Amended Petition, if any, would trigger the No-Contest clause; and
- E. an “order that is lawful, fair and just to the interests of all parties”.

2. On January 15, 2015, this Court entered an order with respect to the Hallett Beneficiaries’ Motion for a Ruling on the Safe Harbor Provision of NH RSA 564-B:10-1014(c)(3). The various filings in connection with that motion are outlined in the Court’s order, ¶ 1, which is incorporated herein by reference.

3. In the January 15, 2015 Order, the Court held that (i) all Counts, except for Count I, of the Hallett Beneficiaries’ original Petition in these consolidated matters – “if pursued in total” -- constitute a “contest” with the Trust’s Article 13 “No-Contest Clause,” and (ii) whether the “No-Contest Clause” is enforceable against the Hallett Beneficiaries cannot be determined until the time of trial.

4. The Court further held that the “initial filing” of that original Petition did not, by itself, constitute a “contest.” That is, the Court essentially gave the Hallett Beneficiaries an “out” – stating that the Hallett Beneficiaries are not “inextricably bound to pursue all claims to their evidentiary conclusion.” The Court went on to explain the Hallett Beneficiaries’ three options in light of the foregoing subsidiary conclusion – which three options were to (1) “accede to the trust; (2) proceed with the Verified Petition as cast and risk an evidentiary ruling after trial that the nocontest provision is triggered [citation omitted]; or (3) file a Motion to Amend adding, deleting, or modifying claims.”

5. The Court further noted, in connection with the third option, that it did “not intend to imply that it will ad infinitum entertain serial motions requesting its determination whether amendments or modifications implicate the no-contest clause.”

6. In their pending motion, the Hallett Beneficiaries seek to amend their petition, but simply re-allege more of the same – namely, allegations (unfounded) challenging the Co-Trustees’ administration of the Trust. Specifically, the proposed Verified Amended Petition contains five counts as follows:

- |           |  |
|-----------|--|
| COUNT I:  | Trustees’ Duty to Administer, Invest and Manage Trust, and Distribute Trust Property and Duty of Loyalty |
| COUNT II  | Trustees’ Duty to Administer, Invest and Manage Trust, and Distribute Trust Property and Duty of Loyalty |
| COUNT III | Record Keeping and Identification of Trust Property  |
| COUNT IV  | Duty to Inform and Report  |
| COUNT V   | Request for Attorney Fees and Costs  |

7. The 168 paragraph proposed Petition makes allegations with respect to life insurance proceeds in which the Trust was not the beneficiary, rental payments on property that was properly deeded to Barbara Hallett, issues with the administration of the Estate of Richard

Hallett, failure to keep records from 1997 and 1998 and failure to report consistent with the provisions of NH R.S.A. 564-B:8-813.

8. In addition, the Hallett Beneficiaries have not otherwise heeded this Court's warning regarding their options. In the January 15, 2015 Order, the Court held that the initial filing of the original Petition was not a "contest." The Hallett Beneficiaries have done more than just file the original Petition, however. Indeed, on December 1, 2014 (after counsel discussed the Safe Harbor issue at the November 5, 2014 Structuring Conference, and the Hallett Beneficiaries were aware this was a disputed issue,) one of the Hallett Beneficiaries, Amy Hallett Hebert (hereinafter, "Amy"), served Interrogatories and Requests For Production of Documents upon the Co-Trustees.

9. Moreover, even after this Court issued its January 15, 2015 Order, the Hallett Beneficiaries proceeded with discovery, reviewing Barbara's document production in response to Amy's December 1, 2014 requests, answering Barbara's interrogatories (including by stating in those responses that they continue to stand by the allegations made in the original Petition and listing no fewer than forty-five (45) potential trial witnesses) and serving a so-called expert disclosure (although same is deficient and will likely be the subject of a future Motion to Strike.)

10. As the Court is aware from the prior filings on this issue, the Trust's Article 13 "No-Contest" Clause states that:

Contest of Will or Trust. It is the Grantor's will and direction that if any beneficiary under this Trust or under the Grantor's Will, or any other person, shall, directly or indirectly institute, conduct or in any manner whatsoever take part in or aid in any proceeding to oppose the probate of said will, or any codicil thereto, or the administration of this Trust, or any amendment hereto, or impair, invalidate or set aside the same, or any of their provisions, then, in such event, the provisions herein made for the benefit of such persons or person shall thereupon be revoked. Such person or persons shall thereafter be excluded from any participation in this Trust and shall, thenceforth, have no right, title or interest in the assets of this Trust. Any property, devise, bequest or distribution to such

*person or persons shall thereafter pass as if such person or persons did not survive the Grantor.*

Nothing contained herein shall be construed to prevent the Trustees from instituting or bringing any action, suit or proceeding for the construction or interpretation of this Trust, nor to prevent any beneficiary from disclosing relevant information in such a proceeding.

(emphasis added) The Trust is attached in its entirety to the Hallett Beneficiaries' Petition.

11. NH RSA 564-B:10-1014, in subsections (b) and (d), specifically provides that no-contest provisions contained in trusts “shall be enforceable according to the express terms of the no-contest provision without regard to the presence or absence of probable cause for, or the beneficiary’s good or bad faith in, taking the action that would justify the complete or partial forfeiture of the beneficiary’s interest in the trust under the terms of the no-contest provision”; and, that it is the intent of Section 10-1014 “to enforce the settlor’s intent as reflected in a no-contest provision to the greatest extent possible. The provisions of this section shall be construed and applied in a manner consistent with such intent.”

12. Recently enacted New Hampshire statutes and longstanding New Hampshire Supreme Court case law evidence the State of New Hampshire’s history and practice of giving deference to the clear terms of a trust and the testator’s wishes. See, e.g., NH RSA 564-B:10-1014 (b). The New Hampshire Supreme Court recently noted “the intention of the settlor is paramount,” and the Court should determine the intent from the express terms of the trust itself. Shelton v. Tamposi, 62 A.3d 741, (citing Appeal of Lowy, 156 N.H. 57, 61 (2007)). The Court should reject any construction of the trust language that would defeat the clear and expressed intention of the settlor’s intent.” Id.

13. There are exceptions to the applicability of subsection (b), which exceptions – in relevant part – provide that “[i]n the case of an action solely to challenge the acts of the trustee or other fiduciary of the trust, a no-contest provision shall be unenforceable to the extent that the

trustee or other fiduciary has committed a breach of fiduciary duties or breach of the trust.” If Hallett Beneficiaries are relying on this exception, however, then these issues must be determined in the usual course – that is, after an opportunity for discovery and trial – *not* preliminarily.

14. The Code language itself reflects this common-sense conclusion, inasmuch as there is no statutory provision that permits a preliminary ruling on the applicability of the Safe Harbor Provision. Such a preliminary ruling of inapplicability would be premature – not only because it denies the opportunity for discovery and trial on Hallett Beneficiaries’ allegations regarding breaches of trust – but also because, as litigation strategies change, pleadings are amended and facts are revealed through discovery, a determination regarding the applicability of the Safe Harbor Provision could change throughout the course of the litigation.

15. Based on the foregoing, particularly the actions the Hallett Beneficiaries have taken beyond the initial filing of the original Petition, and the repeated allegations of misadministration in the proposed Amended Petition, the only preliminary determination the Court should make is that (i) based on the Hallett Beneficiaries’ actions to date, the Trust’s No-Contest provision *has* been irrevocably triggered for the same reasons stated in this Court’s January 15, 2015 Order; and, (2) the Hallett Beneficiaries are not permitted to seek further preliminary inquiry regarding the Safe Harbor or No-Contest issues, as said issues will be determined after a trial or other dispositive motion (such as summary judgment) in these consolidated matters.

16. The Court has already found that “the journey to these safe harbors is necessarily fraught with risk for a litigant, as actual invalidity of the trust, or breach of duty by a trustee, cannot be determined in advance of completed litigation. The only preliminary adjudication of risk that may be made permissibly is whether a claim constitutes a ‘contest’ that would bring a

legal action within the no-contest terms of a trust. RSA 564-B:10-1014(c)(3). A court cannot predict whether, or presume that, the safe harbor provisions within section (b) apply so as to render a no-contest provision unenforceable on allegations alone.” (Court’s 1/15/15 order, p. 7). The Court further previously found that Breach of Fiduciary Duty, Unjust Enrichment, Accounting and Reporting improprieties and Failure to Act claims all are claims that advance a contest to the trust. (Court’s 1/15/15 order, p. 10). The Hallett Beneficiaries’ efforts to retitle old allegations – despite the Court offering opportunity to do otherwise -- do not mask their clear attempt to circumvent the decedent and settlor Richard S. Hallett’s clear intent as evidenced by the Trust language. See Trust, Article 1 (clearly directing that the Co-Trustees become Trustees upon the death or incompetency of Richard S. Hallett.)

17. The Trust language makes clear that the Trust is primarily for the benefit of the “Grantor’s Wife,” Barbara Hallett, during her life time. See id., Article 6, 7, 8. For example, Article 8 of the Trust outlines the annual income Barbara Hallett is to receive under the Trust.

18. None of the allegations in the proposed Verified Amended Petition relate to the construction or interpretation of the terms of the Trust, but rather to the Hallett Beneficiaries’ claim of improper administration. In fact, the Hallett Beneficiaries outline in great detail the distributions to Barbara Hallett over the past 18 years, but do not state with specificity why they are improper. In fact, the 35 page proposed Verified Amended Petition, like the 57-page Petition previously filed, does not cite to any language of the Trust as supporting their position, nor does the Petition anywhere identify the terms that need to be construed or interpreted. It is evident that the Hallett Beneficiaries continue with their efforts to undo the estate plan of Richard Hallett, who intended to provide income to his wife for the remainder of her life.

19. It remains the Co-Trustees' position that all actions taken by either trustee were consistent with the provisions of the Trust and applicable law. In fact, the Co-Trustees have filed their own actions – consolidated with this action – seeking a declaration on the No Contest Clause and Safe Harbor Provision,<sup>1</sup> as well as approval of annual accounts of the Trust activities.

20. The Hallett Beneficiaries' continued allegations of breach of fiduciary duty remain merely pleading strategies and vagaries in order to try to circumvent the clear intent of decedent Grantor Richard S. Hallett to have the Co-Trustees serve as Trustees. See, e.g., Ross v. The Home Ins. Co., 146 N.H. 468, 471 (2001), quoting M. Mooney Corp. v. U.S. Fidelity & Guaranty Co., 136 N.H. 463, 469 (1992) (Courts should inquire into the underlying facts to avoid permitting the pleading strategies, whims and vagaries of third party claimants to control the rights of parties to an insurance contract). This is demonstrated in the Hallett Beneficiaries' proposed prayers for relief. They avoid requesting the removal of the trustees and an award of damages against the trustees by merely suggesting that it is in the Court's power to make such orders. (proposed Verified Amended Petition, pp. 32-33). This is insufficient to circumvent this Court's finding that a "Court cannot predict whether, or presume that, the safe harbor provisions within section (b) apply so as to render a no-contest provision unenforceable on allegations alone." (Court's 1/15/15 order, p. 7).

21. The Hallett Beneficiaries' efforts to couch their claims in terms of breach of trust and/or breach of fiduciary duty are nothing but a continued transparent and groundless attempt to avoid the Safe Harbor Provision given the Hallett Beneficiaries' true objectives. In short, they

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<sup>1</sup> The Co-Trustees intend to seek leave from this Court to amend their Declaratory Judgment count, which amendment is for the sole purpose of putting the Hallett Beneficiaries on notice that the Co-Trustees are invoking the No-Contest Clause as to actions taken since the filing of the Co-Trustees' original Petitions. The Co-Trustees further intend to seek leave to add to the request for approval the accounting of the Trust's activities for the year ending December 31, 2014.



seek to “impair, invalidate or set aside” provisions of the Trust. See Trust, Clause 13). This is precisely the circumstance in which the No Contest Clause is triggered.

22. Consequently, the Court should rule that (i) the Hallett Beneficiaries’ actions to date, including without limitation the proposed Amended Petition, constitute a “contest” within the Article 13 “No-Contest” Clause, (ii) the Court cannot preliminary make any determinations regarding the enforceability of that Clause, and (iii) the Hallett Beneficiaries are precluded from seeking any further *preliminary* ruling on the No-Contest Clause or Safe Harbor issues.

23. The Co-Trustees otherwise do not object to the Hallett Beneficiaries amending their Petition, with one exception – namely, the Court should deny the motion as to Count IV, as there is no reasonable basis for prevailing on Count IV. While generally the amendment of pleadings is liberally granted, the amendment in this case is futile, as the plaintiff has no likelihood of success on the merits.

24. Count IV alleges a failure to provide annual reports as required by N.H. RSA 564-B:8-813. However, the reporting requirements of this statute are not applicable to the Trust. Specifically, N.H. RSA 564-B:8-813(f) provides as follows:

(f) Subsections (b), (c), and (d) of this section shall apply only to a trustee who accepts a trusteeship on or after October 1, 2004, to an irrevocable trust created on or after October 1, 2004, and to a revocable trust which became irrevocable on or after October 1, 2004.

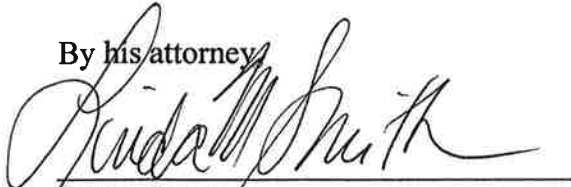
25. The subject trust became irrevocable on April 19, 1997, the date of Richard Hallett’s death. On that same date, William Brennan and Barbara Hallett became trustees. Thus, they were the trustees of an irrevocable trust prior to October 1, 2004, and N.H. RSA 564-B:8-813(b), (c) and (d) are inapplicable and cannot serve as the basis for liability in this matter.

WHEREFORE, the Co-Trustees respectfully requests that this Honorable Court:

- A. Issue an order that the Hallett Beneficiaries' actions to date, including without limitation the proposed Verified Amended Petition, is a "contest" and therefore triggers the No-Contest Clause of the Trust;
- B. To the extent that the Hallett Beneficiaries' motion may properly be considered to be a Motion to Amend the Petition, issue an order that said motion is denied with respect to the proposed Count IV of the Hallett Beneficiaries' Verified Amended Petition, as that Count is futile;
- C. Otherwise deny the Hallett Beneficiaries' Motion, subject to the parties' rights to dispute at trial or other final hearing (such as a summary judgment hearing) in this matter the enforceability of the No-Contest Clause;
- D. Issue an order prohibiting the Hallett Beneficiaries from seeking a further preliminary ruling (except to move for, or oppose, summary judgment) regarding the No-Contest or Safe Harbor issues; and,
- E. Grant such other and further relief that the Court deems just and equitable.

WILLIAM BRENNAN,  
INDIVIDUALLY AND AS TRUSTEE  
OF THE RICHARD S. HALLETT 1996  
REVOCABLE TRUST

By his attorney,



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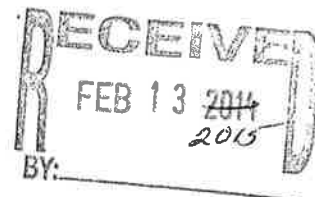
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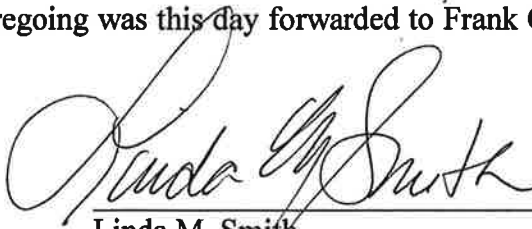
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Dated: February 13, 2015

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was this day forwarded to Frank Coffey and Kenneth Bernard.

  
\_\_\_\_\_  
Linda M. Smith